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Parents, Children, and the Institutionalization Process: A Constitutional Analysis

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Parents, Children, and the Institutionalization Process—A Constitutional Analysis

I. Introduction

The constitutional rights of minors are continually being expanded and in many areas are approaching those recognized for adults.[1] This expansion follows judicial recognition that minors as well as adults are persons under the Constitution entitled to constitutional rights and protections. Seeking even greater constitutional recognition, minors have recently attacked the constitutionality of state statutes that allow parents to institutionalize their children for mental health treatment.[2] The challenge rests upon the assertion that children possess liberty interests in the institutionalization process deserving of constitutional protection.

In *Bartley v. Kremens*[3] a three-judge court for the Eastern District of Pennsylvania invalidated Pennsylvania's juvenile commitment statute and mandated due process protections similar to those afforded to adults in involuntary commitment proceedings. This comment examines the various interests involved in the area of juvenile commitments and suggests reasons why the Constitution does not require states to afford minors the full due process protections ordered by the *Bartley* court.

II. Pennsylvania's Mental Health Admission Procedures—A Continuing Constitutional Battle

A. Bartley v. Kremens[4]*—The Mental Health and Mental Retardation Act of 1966*[5]

Many states entrust parents and psychiatrists with the decision

1. *See* notes 49-63 and accompanying text *infra.*

2. *See* J.L. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976) (three-judge court), *prob. juris. noted,* 431 U.S. 936 (1977); Kidd v. Schmidt, 399 F. Supp. 301 (E.D. Wis. 1975) (three-judge court); Saville v. Treadway, 404 F. Supp. 430 (M.D. Tenn. 1974) (three-judge court).

3. 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded,* 431 U.S. 119 (1976), *reinstated sub nom.*, Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30 (E.D.Pa. 1978) (three-judge court), *prob. juris. noted,* June 19, 1978 (argument heard Oct. 10, 1978).

4. *Id.* (hereinafter subsequent history will be omitted and citations will refer to the particular opinion in question).

5. PA. STAT. ANN. tit. 50, §§ 4101-704 (Purdon 1969) [hereinafter referred to as the 1966 Act].

to authorize institutionalization of minors who need mental health treatment.[6] A minor's commitment is effectuated without the substantial procedural protections afforded to adults in similar proceedings.[7] Pennsylvania, for example, allows a parent to initiate the institutionalization of his child by subjecting the child to a psychiatric evaluation to determine whether he is mentally ill and requires inpatient psychiatric treatment. After the child's examination, if both the parent and doctor concur in his need for institutionalization, the child is admitted and the appropriate treatment begins.

In *Bartley* several Pennsylvania juveniles instituted a class action,[8] which attacked the constitutionality of the state procedures under which they were committed to state mental institutions[9] on both due process and equal protection grounds.[10] Although prior to admission each plaintiff had received a psychiatric evaluation to insure the necessity of institutional treatment,[11] plaintiffs asserted that

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6. *See* 1976 Haw. Sess. Laws, Act 130, § 334; IDAHO CODE §§ 66-318, 66-320 (1973 & Supp. 1978); KY. REV. STAT. § 202 A.020 (1976); MASS. GEN. LAWS. ANN. ch. 123, §§ 10, 11 (West 1969 & Supp. 1978); MO. ANN. STAT. § 202.115 (Vernon 1972 & Supp. 1979); NEV. REV. STAT. §§ 433A.140, 433A.560 (1971); N.H. REV. STAT. ANN. § 135-B:11 (1978); N.J. STAT. ANN. § 30:4-46 (West 1964 & Supp. 1978); N.Y. MENTAL HYG. LAW § 9.13 (McKinney 1978); OKLA. STAT. ANN. tit. 43A, § 184 (West 1951 & Supp. 1978); OR. REV. STAT. § 426.220 (1977); TENN. CODE ANN. § 33-601 (1977); UTAH CODE ANN. § 64-7-29 (1978); WIS. STAT. ANN. § 51.10 (West 1957 & Supp. 1978); WYO. STAT. § 25-3-106 (1977).

7. *See* note 149 *infra.*

8. The class consisted of "all persons eighteen years of age or younger who have been, are, or may be admitted or committed to mental health facilities in Pennsylvania under the [1966 Act]." Bartley v. Kremens, 402 F. Supp. 1039, 1041 (E.D. Pa. 1975) (three-judge court). The action was instituted under 42 U.S.C. § 1983 (1976), which provides,

> Every person who, under color of [state law], subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Maintaining an action under this section depends on a showing of sufficient "state action" in the challenged activity. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

9. The juveniles were admitted to the state institutions pursuant to §§ 4402 and 4403 of the 1966 Act. Section 4402 provides in pertinent part as follows:

> (a) Application for voluntary admission to a facility for examination, treatment and care may be made by:
> (1) Any person over eighteen years of age.
> (2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

Section 4403 authorized persons identical to those in § 4402 to initiate admission, even though this section is entitled "voluntary commitment." In *Bartley* no distinction was made between these two sections, and this comment uses the words "admitted" and "committed" interchangeably. *See* Kremens v. Bartley, 431 U.S. 119, 122 n.2 (1977).

10. Since the court disposed of the case on due process grounds, it did not address plaintiffs' equal protection arguments, which were founded upon the disparate treatment between minors and adults in the admission process. Plaintiffs also argued that they were denied equal protection because only persons over eighteen could voluntarily admit or commit themselves to an institution. The court dismissed this argument for lack of standing since plaintiffs did not allege any attempt or desire to commit themselves. Bartley v. Kremens, 402 F. Supp. 1039, 1054 n.27 (E.D. Pa. 1975) (three-judge court).

11. Sections 4402 and 4403 of the 1966 Act require the director of the admitting facility to "cause an examination" to be made to determine whether care or observation is necessary prior to admitting the juvenile.

additional protection was necessary to prevent the erroneous institutionalization of children who are not mentally ill.[12] They argued that minors were entitled to substantial due process safeguards before commitment.[13]

While the action was pending, the Pennsylvania Department of Public Welfare promulgated regulations that substantially increased the procedural protections afforded minors both prior to and after admission to mental health facilities.[14] The regulations required that two independent psychiatric evaluations concur in the need for institutionalization before the juvenile could be hospitalized.[15] Furthermore, juveniles age thirteen or older who objected to remaining at the institution were afforded a judicial hearing complete with full due process protection.[16]

The defendants argued that the purpose of the 1966 Act was to treat children suffering from mental illness, rather than to punish them for engaging in illegal behavior, and therefore, the requirements of due process did not apply.[17] Alternatively, defendants argued that the 1966 Act and its complementary regulations[18] adequately protected a minor's constitutional rights. Finally, defendants contended that parents waive a minor's due process rights by initiating the institutionalization process.[19]

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12. Anyone confined in a mental institution can attack his confinement through habeas corpus. PA. STAT. ANN. tit. 50, § 4426 (Purdon 1969). At oral argument before the United States Supreme Court on Oct. 10, 1978, Mr. Justice Marshall commented that habeas corpus is a noneffective remedy against erroneous confinement for those children too young to understand its availability or use. At no time, however, have any of the plaintiffs challenged the necessity of their confinement, although some have completed their treatment and have been discharged, and they have all had the benefit of counsel at least since the commencement of the suit. Brief for Appellants, at 35 n.21, Institutionalized Juveniles v. Secretary of Pub. Welfare, NO. 77-1715 (U.S. filed Aug. 3, 1978).

13. The rights demanded by plaintiffs are as follows: (1) right to notice; (2) right to a pre-commitment hearing; (3) right to counsel and if indigent, the right to appointment of counsel; (4) right to present evidence on their own behalf; (5) right to subpoena witnesses and documents; (6) right to confront and cross-examine witnesses; (7) right to a judicial determination regarding commitment; (8) right to be committed only upon a decision that they need treatment, care, or observation. Bartley v. Kremens, 402 F. Supp. 1039, 1042 (E.D. Pa. 1975)(three-judge court). The last right demanded by plaintiffs appears to be guaranteed by the 1966 Act, *supra* note 5, at §§ 4402(b), 4403(b).

14. Bartley v. Kremens, 402 F. Supp. 1039, 1042-43 n.5 (E.D. Pa. 1975) (three-judge court).

15. *Id.* For the mentally retarded, one of the evaluations may be a medical or psychological evaluation conducted by a pediatrician, general physician or psychiatrist. *Id.*

16. *Id.* Plaintiffs argued that the constitutionality of the 1966 Act was not saved by the supplementing regulations because the regulations did not apply to children under thirteen, require a pre-commitment hearing, nor designate a time by which a post-commitment hearing must be held. *Id.* at 1042-43.

17. The court rejected the argument that the necessity of due process requirements depends upon whether the confinement is for punative or benevolent purposes. Other courts have rejected similar arguments. *See, e.g., In re* Gault, 387 U.S. 1 (1966); Hereford v. Parker, 396 F.2d 393 (10th Cir. 1968).

18. Bartley v. Kremens, 402 F. Supp. 1039, 1044-45 (E.D. Pa. 1975) (three-judge court).

19. The court held that because a conflict of interest between the parent and the child in

The *Bartley* court held that the Pennsylvania commitment procedures were unconstitutional and enjoined their enforcement.[20] Specifically, the court held that minors are entitled to the following due process protections prior to institutionalization: (1) a probable cause hearing within seventy-two hours of commitment; (2) a post-commitment hearing within two weeks; (3) written notice of the hearing; (4) counsel at all significant stages of the commitment process and, if indigent, the right to appointment of free counsel; (5) the right to be present at all commitment hearings; (6) a finding by clear and convincing proof that they are in need of institutionalzation; and (7) the rights to confront and cross-examine witnesses against them and to offer evidence in their own behalf.[21] Additionally, the court ordered that Pennsylvania either release all minors in institutions or recommit them employing the newly mandated procedures.[22]

B. The Supreme Court Intervenes—Pennsylvania Enacts the Mental Health Procedures Act

The United States Supreme Court, upon petition by the defendants, granted a stay in the implementation of the district court's order.[23] Shortly thereafter, probable jurisdiction was noted and argument was heard by the Court,[24] but prior to a decision, Pennsylvania enacted the Mental Health Procedures Act,[25] which repealed the challenged sections of the 1966 Act except those sections relating to the mentally retarded.[26] Under the 1976 Act parents can no longer institutionalize children over fourteen.[27] Minors over fourteen can both admit themselves and later withdraw from treat-

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the institutionalization decision is possible, parents cannot waive their child's due process rights. The court stated, "[I]f we could find that in all instances parents act in the best interest of their children, we might also find that parents may waive constitutional rights of their children." *Id.* at 1047. For a mild criticism of discussing the issue in terms of waiver, see Comment, *Due Process Limitations on Parental Rights to Commit Children to Mental Institutions,* 48 U. COLO. L. REV. 235 (1977), wherein the author states that the issue is whether "parental family rights precluded inquiry into the child's constitutional rights when parents are acting on the child's behalf." *Id.* at 254.

20. Bartley v. Kremens, 402 F. Supp. 1039, 1053-54 (E.D. Pa. 1975) (three-judge court).

21. *Id.* at 1053.

22. Bartley v. Kremens, No. 72-2272 (final order of Nov. 17, 1975).

23. Kremens v. Bartley, 423 U.S. 1028 (1975).

24. Argument was heard on Dec. 1, 1976.

25. PA. STAT. ANN. tit. 50, §§ 7101-503 (Purdon 1969 & Supp. 1978) [hereinafter referred to as the 1976 Act].

26. Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30, 33 (E.D. Pa. 1978) (three-judge court).

27. Section 7201 of the 1976 Act, *supra* note 25, provides in pertinent part as follows:

> Any person 14 years of age or over who believes that he is in need of treatment and substantially understands the nature of voluntary commitment may submit himself to examination and treatment under this act, provided that the decision to do so is made voluntarily. A parent, guardian, or person standing in loco parentis to a child less than 14 years of age may subject such child to examination and treatment under this act, and in so doing shall be deemed to be acting for the child.

ment by giving written notice.[28] Children under fourteen, however, can only be admitted[29] to an institution or withdrawn from it upon application by their parent or guardian.[30] Further protection is afforded by a treatment plan that must be formulated for each patient within three days of admission.[31] The plan must also be re-evaluated, at least every thirty days, and the patient must be discharged if treatment is no longer appropriate.[32] The 1976 Act also allows any "responsible" person who believes that a child's treatment is either no longer necessary or should be administered in a less restrictive setting[33] to file a petition in juvenile court requesting withdrawal of the patient from treatment or modification of the treatment.[34] After such a petition is filed, an attorney is appointed to represent the child and a full judicial hearing must follow.[35]

In light of the passage of the 1976 Act, the Supreme Court va-

28. PA. STAT. ANN. tit. 50, § 7206(a) (Purdon 1969 & Supp. 1978). In certain situations release may be delayed for up to three days provided that the patient had agreed to the delay in writing at the time of admission. *Id.*

29. *Id.* § 7201.

30. *Id.* § 7206(b).

31. *Id.* § 7205. The plan must be formulated by a "treatment team" and become part of the patient's record. "The treatment plan shall state whether inpatient treatment is considered necessary, and what restraints or restrictions, if any, will be administered, and shall set forth the bases for such conclusions." *Id.*

32. PA. STAT. ANN. tit. 50, § 7108 (Purdon 1969 & Supp. 1978) provides the following:

> (a) Reexamination and Review. Every person who is in treatment under this act shall be examined by a treatment team and his treatment plan reviewed not less than once in every 30 days.
>
> (b) Redisposition. On the basis of reexamination and review, the treatment team may either authorize continuation of the existing treatment plan if appropriate, formulate a new individualized treatment plan, or recommend to the director the discharge of the person. A person shall not remain in treatment or under any particular mode of treatment for longer than such treatment is necessary and appropriate to his needs.
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> (c) Record of Reexamination and Review. The treatment team responsible for the treatment plan shall maintain a record of each reexamination and review under this section for each person in treatment to include:
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> (1) a report of the reexamination, including a diagnosis and prognosis;
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> (2) a brief description of the treatment provided to the person during the period preceding the reexamination and the results of that treatment;
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> (3) a statement of the reason for discharge or for continued treatment;
>
> (4) an individualized treatment plan for the next period, if any;
>
> (5) a statement of the reasons that such treatment plan imposes the least restrictive alternative consistent with adequate treatment of his condition; and
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> (6) a certification that the adequate treatment recommended is available and will be afforded in the treatment program.

33. For a discussion of the "least restrictive alternative" concept, see Halderman v. Pennhurst State School and Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *appeal docketed,* No. 78-1490 (3d Cir. April 13, 1978); J. L. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976) (three-judge court), *prob. juris. noted,* 431 U.S. 936 (1977).

34. PA. STAT. ANN. tit. 50, § 7206(b). At oral argument before the Supreme Court on Oct. 10, 1978, Mr. Justice Marshall commented that young children rarely have friends mature enough to file a petition in court challenging the propriety of inpatient treatment. In response, Deputy Attorney General, Norman Watkins, arguing for Pennsylvania, pointed out that plaintiffs apparently had such a friend (the attorney who filed the action on their behalf).

35. *Id.*

cated the district court's order and remanded the case for further consideration.[36] The Court emphasized to the district court that careful attention must be paid to the differences between the interests of older and younger juveniles. The Court observed,

> This distinction between older and younger juveniles, recognized by state administrative authorities (and later by the Pennsylvania Legislature in its enactment of the 1976 Act), emphasizes the very possible differences in the interests of the older juveniles and the younger juveniles. Separate counsel for the younger juveniles might well have concluded that it would not have been in the best interests of their clients to press for the requirement of an automatic pre-commitment hearing, because of the possibility that such a hearing with its propensity to pit parent against child might actually be antithetical to the best interest of the younger juveniles.[37]

C. *Bartley Revisited*[38]

On remand,[39] the district court found "no significant differences between older and younger *mentally retarded* juveniles for due process purposes."[40] The court, however, failed to analyze possible differences between the interests of older and younger *mentally ill* juveniles within the plaintiff class,[41] which implied that no differences exist.[42] Moreover, while the court agreed with the Supreme Court that significant differences do exist between the mentally ill and the mentally retarded, the court held that the possibility of erro-

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36. Kremens v. Bartley, 431 U.S. 119 (1977), the Supreme Court held that the 1976 Act mooted the named plaintiffs' claims because all of the named plaintiffs were over fourteen and, therefore, were entitled to full due process protections. *Id.* at 129. The Court also held that the 1976 Act so sufficiently fragmented the entire class that a decision on the merits would be improper. *Id.* at 132.

37. 431 U.S. at 135. Additionally, the Court noted that careful attention should be paid to the differences between the mentally ill and the mentally retarded. *Id.*

38. Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30 (E.D. Pa. 1978) (three-judge court).

39. A new plaintiff class was certified consisting of "all juveniles under the age of fourteen who are subject to inpatient treatment under Article II of the 1976 Act," *id.*, at 41, and "mentally retarded juveniles age eighteen or younger," *id.*, at 42. The district court also certified a class of defendants consisting of the "directors of all mental health facilities in Pennsylvania which are subject to regulation by the defendant Secretary of Public Welfare." *Id.*, at 40 n.37. As a result of the broadness of the district court's class certification, the defendant class includes the "directors of private facilities, community-based group homes and mental health centers, as well as private schools 'approved' to dispense mental health or mental retardation therapy." Brief for Appellants at 19 n.6, Institutionalized Juveniles v. Secretary of Pub. Welfare, No. 77-1715 (U.S. filed Aug. 3, 1978). The essentially private nature of many of the mental health facilities within the defendant class raises serious questions regarding the requisite "state action" to maintain an action under 42 U.S.C. § 1983 (1976). *See* note 89 and accompanying text *infra.*

40. Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30,42 (E.D. Pa. 1978) (three-judge court) (emphasis added).

41. The mentally ill juveniles in the plaintiff class are under fourteen years old.

42. *See* notes 98-118 and accompanying text *infra* (constitutional significance of age in determining the weight to be accorded a minor's liberty interests).

neous commitment[43] and the "stigma"[44] attached to institutionalization demand that both groups be treated identically.[45] Hence, the district court again found the Pennsylvania institutionalization procedures unconstitutional and reaffirmed the necessity for substantial due process protections.[46]

By balancing the conflicting public and private interests involved in the institutionalization process, the *Bartley* court reached the determination that due process requires affording minors a full complement of safeguards. The starting point for an analysis of the *Bartley* result, thus, is the individual examination of these interests.

III. Fourteenth Amendment Liberty Interests Implicated In The Admission Of Minors To Mental Institutions

A. Minor's Liberty Interest

Personal liberty both includes the right to be free from bodily restraint[47] and encompasses the protection of a person's good name or reputation.[48] Since minors are "persons" under the Constitution they are entitled to these rights.[49] As the Supreme Court has enunciated, "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[50]

One of the most important rights that is derived from a person's liberty interest is the right to be free from arbitrary state confinement. This right has frequently been recognized in juvenile court proceedings.[51] In *In re Gault,*[52] for example, a fifteen-year-old boy was arrested for allegedly making lewd telephone calls. A hearing was held before a juvenile court judge and the boy was adjudicated a delinquent and committed to a state institution.[53] In reversing the

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43. *See* notes 162-176 and accompanying text *infra.*

44. *See* notes 57-63 and accompanying text *infra.*

45. Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30, 38-40 (E.D. Pa. 1978) (three-judge court) (emphasis added). The differences between the mentally ill and the mentally retarded are beyond the scope of this comment. *See generally* Halderman v. Pennhurst State School and Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *appeal docketed,* No. 78-1490 (3d Cir. April 13, 1978); Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law,* 51 S. CAL. L. REV. 527 (1978).

46. Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30 (E.D. Pa. 1978) (three-judge court).

47. O'Connor v. Donaldson, 422 U.S. 563 (1975); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

48. Goss v. Lopez, 419 U.S. 565 (1975); Board of Regents v. Roth, 408 U.S. 564 (1972); Wisconsin v. Constantineau, 400 U.S. 433 (1971).

49. In Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), the Court held that minors possess first amendment rights within the school environment. The Court stated that minors are "possessed of fundamental rights which the State must respect just as [the minors] must respect their obligations to the State." *Id.* at 511.

50. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

51. *See In re* Gault, 387 U.S. 1 (1966), *see also* cases cited in note 54 *infra.*

52. *Id.*

53. The minor's parents were not informed of their son's arrest and no formal notice was

adjudication, the United States Supreme Court noted that the particular procedures afforded were not constitutionally adequate to safeguard the liberty interests at stake.[54] The Court rejected the notion that juveniles do not possess liberty interests deserving of protection because the purpose of juvenile court proceedings is to rehabilitate rather than to punish the juveniles. Speaking for the Court, Mr. Justice Fortas observed,

> The right of the state, as *parens patriae,* to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty but to custody." . . . On this basis, proceedings involving juveniles were described as "civil" not "criminal" and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.
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> Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is — to say the least — debatable. And in practice . . . the results have not been entirely satisfactory.[55]

The *Gault* reasoning applies equally to juvenile institutionalization proceedings; the state's benevolent motive of providing necessary medical care to a minor is insufficient constitutional justification for the state to ignore a minor's liberty interest in being free from arbitrary state confinement.[56]

Institutionalization for mental illness entails, in addition to loss of personal freedom, possible damage to the individual's reputa-

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given to the parents about the juvenile court hearing the next day. At the hearing, the boy's accuser did not testify, the witnesses were not sworn and a transcript of the hearing was not made. *Id.* at 5.

54. The Court held that juveniles are entitled to (1) notice of the charges; (2) the right to counsel and if indigent, the right to appointment of counsel; (3) the right to confront witnesses; (4) the right to cross-examine witnesses; (5) and the right to assert the privilege against self-incrimination. The Court specifically limited its holding to "proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution." 387 U.S. at 13. *See also* Swisher v. Brady, 98 S. Ct. 2699 (1978) (double jeopardy attaches to an adjudicatory master's hearing); Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy attaches to juvenile court proceedings); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (jury trial not required in juvenile court proceedings); *In re* Winship, 397 U.S. 358 (1970) (proof beyond a reasonable doubt constitutionally required in juvenile court proceedings); Kent v. United States, 383 U.S. 541 (1966) (juvenile courts do not have unbridled discretion in determining whether to entertain jurisdiction over a particular case); Gallegos v. Colorado, 370 U.S. 49 (1962) (coerced confessions may not be introduced in juvenile court proceedings); Haley v. Ohio, 332 U.S. 596 (1948) (same).

55. *In re* Gault, 387 U.S. 1, 17-18 (1966).

56. *See* Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968), in which the court noted,

> It matters not whether the proceedings be labelled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration —whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble minded or mental incompetent—which commands observance of the constitutional safeguards of due process.

Id. at 396.

tion,[57] which the Court has protected in other circumstances. In *Goss v. Lopez*[58] the Supreme Court held in the context of school suspensions that minor school students have a protected liberty interest in their reputation of which they cannot be deprived without due process of law. The Court recognized the damage that such charges would have on the students' reputation: "If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[59] To protect the students' liberty interests and satisfy due process requirements, the Court ordered that the students be given notice of the charges and an opportunity to present their version of the challenged activity to the proper authorities.[60]

Extending constitutional protection of a juvenile's reputation to institutionalization proceedings seems fitting. Although society in general no longer views mental illness with the fear and disdain that it once did,[61] "[e]ven accepting recent medical advances, current studies clearly indicate the fallacy of contending that most people view mental illness as a disease similar to any physical ailment of the body."[62] Furthermore, once the patient is discharged from the institution he "not only must cope with the stigma of having once been hospitalized, but he must often continue to cope with the 'mental illness' label itself."[63]

That minors possess liberty interests in state proceedings that can result in loss of personal freedom[64] or damage to reputation,[65] however, does not necessarily demonstrate the existence of similar liberty interests when parents, who are already entitled to the minor's custody and control, initiate the proceedings to admit the minors to state mental health facilities. The answer is dependent upon the existence and importance of parental liberty interests.

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57. *See In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973). The court discusses the stigma that may attach to the label of mental illness. *Id.* at 668. *See also* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 293 (E.D. Pa. 1972) (discussion of the stigma that may attach to mental retardation). *See generally* Panneton, *Children, Commitment and Consent: A Constitutional Crisis,* 10 FAM. L.Q. 295 (1976).

58. 419 U.S. 565 (1975).

59. *Id.* at 575. The Court also held that the students had a property interest in their education on the basis of applicable state law.

60. *Id.* at 583-84. For a recent Supreme Court decision clarifying *Goss,* see Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978). *See* notes 172-75 and accompanying text *infra.*

61. *See* Panneton *supra* note 57.

62. *In re* Ballay, 482 F.2d 648, 668 (D.C. Cir. 1973).

63. *Id. Cf. In re* Gault, 387 U.S. 1 (1966) (stigma attaches to adjudication of delinquency).

64. *See* notes 51-56 and accompanying text *supra.*

65. *See* notes 58-60 and accompanying text *supra.*

B. Parents' Liberty Interest

The family unit is entitled to significant constitutional protection.[66] Since parents are at the apex of the family relationship, they are given great deference in decisions concerning the upbringing of their children.[67] The Supreme Court has consistently invalidated state legislation unduly encroaching into the sphere of parental authority.[68] In *Pierce v. Society of Sisters*[69] the Court invalidated an Oregon statute that required all parents to send their children to public school through the eighth grade. The Court clearly indicated that parental decisions are cognizable within the liberty concept of the fourteenth amendment:

> [The Act] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[70]

Although the Supreme Court has repeatedly struck down state statutes for infringing on parental constitutional rights,[71] it has consistently maintained that these rights are not absolute.[72] A state has an independent interest in protecting the health and welfare of its

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66. *See* Moore v. East Cleveland, 431 U.S. 494 (1977); Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). *Cf.* Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (constitutional rights of foster parents).

67. Wisconsin v. Yoder, 406 U.S. 205 (1972). The Court recognized that, "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232.

68. Meyer v. Nebraska, 262 U.S. 390 (1923), was the first Supreme Court decision specifically finding parental autonomy protectable under the liberty provision of the fourteenth amendment. The Court struck down a state statute that prohibited the teaching of any modern language other than English in both private and public schools to any student who had not completed the eighth grade. The Court held that the statute violated both the liberty interest of teachers to engage in their chosen occupation and the liberty interest of parents to direct the education of their children.

69. 268 U.S. 510 (1925).

70. 268 U.S. at 534-35. Wisconsin v. Yoder, 406 U.S. 205 (1972), reaffirmed parental liberty interests by declaring a state statute unconstitutional as it applied to Amish parents. The statute required school attendance through the age of sixteen and subjected parents to fines for not requiring their children to attend. The Court held that the statute invaded the parents' liberty interests in controlling the religious upbringing of their children. The record indicated that the parents refused to send their children to school beyond the age of fourteen because of the interference the two additional years would have on the children's religious upbringing, and the state provided no compelling justification for requiring two additional years of school for Amish children.

71. *See* notes 68-70 and accompanying text *supra*. *See also* Stanley v. Illinois, 405 U.S. 645 (1972).

72. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

youth and may restrict parental control if such action is essential to achieve this objective.[73] In *Prince v. Massachusetts*[74] the Supreme Court upheld a state statute prohibiting minors from selling merchandise in public places and prohibiting parents or guardians from furnishing minors any articles for such sale. The *Prince* court found that a guardian had violated this statute when she supplied a minor in her custody with religious materials to sell on the street. The Court recognized that, "neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well-being, the state as *parens patriae* may restrict the parents control [in many ways]."[75]

Decisions like *Pierce* and *Prince* indicate the need to strike an appropriate balance between the state's duty to protect the integrity of the family and its independent duty to protect the health and welfare of its youth. Since parental rights to custody and control of their children are considered "fundamental,"[76] state regulation encroaching upon these rights can only be justified by a compelling state interest.[77] Furthermore, any regulation of parental custody and control must be narrowly drawn to express only the legitimate state interests at stake[78] or the regulation will be invalidated.[79]

This policy of favoring parental control and custody is evident in the great respect that courts accord to parental medical decisions.

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73. *See, e.g.*, Sturges & B. Mfg. Co. v. Beauchamp, 231 U.S. 320 (1913) (restriction of child labor); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination).

74. 321 U.S. 158 (1944).

75. *Id.* at 166. *Cf.* Ginsberg v. New York, 390 U.S. 629 (1968) (restriction of distribution of obscene literature to minors upheld).

76. *See* Roe v. Wade, 410 U.S. 113, 152-53 (1973).

77. *See id.* at 152-55; Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

78. *See* Roe v. Wade, 410 U.S. 113, 155 (1973); Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307-08 (1940).

79. Stanley v. Illinois, 405 U.S. 645 (1972), is an example of a state's attempt to protect its youth, which attempt failed because the particular statute was not drawn narrowly enough to express only the legitimate state interests involved. The Court invalidated an Illinois law that made the children of unwed fathers wards of the state upon the death of the mother. The state did not recognize the father's right to custody of his children and took the children without first determining his fitness as a parent. Illinois declared that the purpose of the statute was to protect both the mental and physical welfare of the minor and the interests of the community as a whole and, concurrently, to protect the minor's family relationships whenever possible. *Id.* at 652.

Finding that the state's interests were legitimate and well within its power to implement, the Supreme Court, nevertheless, invalidated the statute because it not only deprived the father of his fundamental liberty interest, but did not further the state's goals. The Court stated, "We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family." *Id.* at 652-53. *See also* Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977) (emergency taking of custody by the state was proper but the state's refusal to return the children or to conduct a hearing to determine the fitness of the mother was a deprivation of the mother's liberty interests without due process of law).

Because traditionally these decisions have been one of the most important responsibilities entrusted to parents,[80] courts are reluctant to allow state interference even when the child's life is at stake.[81] Indeed, states will normally intercede in medical decisions only when the child's life is in serious jeopardy and the parents are determined to be incompetent to safeguard the child's interests.[82]

Similarly, treatment of a child's mental disorders has historically been recognized as a parental responsibility, and the state's role has been to aid the parents in the discharge of this responsibility.[83] Hence, any state intervention in opposition to these parental decisions about their child's mental health needs should require the same justification that has traditionally been required in other medical areas.[84]

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80. *See In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976). *See also* Bonnor v. Moran, 126 F.2d 121 (D.C. Cir. 1941) (fifteen-year-old child's consent to a medical procedure not a defense to an assault and battery action). *See generally,* Bennett, *Allocation of Child Medical Care Decisionmaking Authority: A Suggested Interest Analysis,* 62 VIRGINIA L. REV. 285 (1976); Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions,* 62 CALIF. L. REV. 840, 855 (1974).

81. *See In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976). In *Quinlan* a father sought legal guardianship of his twenty-one-year old daughter who was in a "persistent vegetative state." The father also requested judicial authority to give him the power to order discontinuance of all extraordinary medical procedures sustaining his daughter's life. The father's request was opposed by the daughter's doctors, the hospital, the State of New Jersey, and the daughter's previously appointed guardian ad litem. The New Jersey Supreme Court appointed the father as guardian with authority to discontinue treatment if the doctors agreed that his daughter had no reasonable chance of improving. Recognizing the gravity of the decision, the court stated,

> The litigation has to do, in final analysis, with her life—its continuance or cessation—and the responsibilities, rights and duties, with regard to any fateful decision concerning it, of her family, her guardian, her doctors, the hospital, the State through its law enforcement authorities, and finally the courts of justice.

70 N.J. at 18, 355 A.2d at 651.

82. *See In re* Green, 448 Pa. 338, 292 A.2d 387 (1972); *In re* Seiferth, 309 N.Y. 80, 127 N.E.2d 820 (1955). *But see* Harley v. Oliver, 404 F. Supp. 450, 456 (W.D. Ark. 1975) ("A parent or guardian of a minor has no legal right to deny proper medical treatment or treatment recommended by the medical profession for any disease of a minor, even though such treatment is contrary to a religious belief of the parent or guardian."); *In re* Sampson, 65 Misc. 2d 658, 317 N.Y.S.2d 641 (Fam. Ct. 1970), *aff'd,* 37 App. Div. 2d 668, 323 N.Y.S.2d 253 (1971), *aff'd,* 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972). *But cf. In re* Application of President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964) (medical treatment ordered against adult's wishes). *See generally,* Bennett, *supra* note 80; Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy,* 86 YALE L.J. 645 (1977).

83. *See generally* A. DEUTSCH, MENTALLY ILL IN AMERICA (1949); Panneton, *supra* note 57.

84. States may not constitutionally interfere with parental decisions without "compelling" justification. *See* notes 76-78 and accompanying text *supra.* This compelling justification is found only if "it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." Wisconsin v. Yoder, 406 U.S. 205, 234 (1972). Recently, several courts have held that the institutionalization of minors for mental health treatment is an area providing compelling justification for state involvement in the institutionalization decision. *See, e.g.,* J. L. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976) (three-judge court), *prob. juris. noted,* 431 U.S. 936 (1977); Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975) (three-judge court); *In re* Roger S., 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977).

The Pennsylvania Legislature entrusts parents and psychiatrists with the responsibility for determining whether children need mental health treatment.[85] The involvement of parents in the institutionalization process is constitutionally significant because it affects the nature of the state's relationship to the child.[86] Parental involvement, however, does not extinguish a child's liberty interest, because the state is still involved in the decision to institutionalize, which deprives the minor of personal freedom.[87] Initially, courts look for the existence of a particular liberty interest, rather than to the weight to be afforded that interest, in determining whether due process requirements apply to a given situation.[88] The state's significant involvement in the child's detention implicates the child's liberty interests and, therefore, is sufficient to trigger fourteenth amendment due process protections.[89]

IV. The Institutionalization Procedures—A Constitutional Analysis

Since minors and parents have liberty interests in the admission of a minor to a state mental institution, states must provide procedural protections that are constitutionally adequate to safeguard the interests. Due process, however, is flexible and its requirements must

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85. *See* notes 25-35 and accompanying text *supra.*

86. *See* notes 119-28 and accompanying text *infra.*

87. *In re* Roger S., 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977).

88. *See* Goss v. Lopez, 419 U.S. 565, 575-76 (1975); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

89. In Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30 (E.D. Pa. 1978) (three-judge court), the district court held that minors have a liberty interest deserving of constitutional protection when they are admitted by their parents to both public and *private* mental health facilities in Pennsylvania. Decisions by the United States Supreme Court and many other courts, however, clearly indicate that Pennsylvania is insufficiently involved in private institutionalization to provide the necessary "state action" to implicate a minor's liberty interests. Pennsylvania's only connection with private institutions is the licensing of the facility. *See* PA. STAT. ANN. tit. 50, §§ 4201(8), 7105 (Purdon 1969 & Supp. 1978). In *In re* John S., – Cal. App. 3d –, 135 Cal. Rptr. 893 (Ct. App. 1977), the court held that,

> The decision to admit minor [to a private licensed mental health facility] was a private one between parents, doctor, and hospital. The state in no way became a party to this parental decision involving medical treatment for their minor child, anymore than it would become party to a parental decision to send their child to a private boarding school, to summer camp, or to his room.

– Cal. App. 3d at –, 135 Cal. Rptr. at 901. *See also* Flagg Bros. Inc. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Evans v. Newton, 382 U.S. 296 (1966); Madry v. Sorel, 558 F.2d 303 (5th Cir. 1977); Parks v. Ford, 556 F.2d 132 (3d Cir. 1977); Taylor v. St. Vincent's Hosp., 523 F.2d 75 (9th Cir. 1975), *cert. denied,* 424 U.S. 948 (1976). *Cf.* Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1976) (alleged discrimination in admission procedures of private university; no state action); Fulton v. Hecht, 545 F.2d 540 (5th Cir. 1977) (alleged civil rights violations by private kennel club; no state action). For a more detailed analysis of "state action" as it relates to private mental health facilities in Pennsylvania, see Brief for Appellants at 47-52, Institutionalized Juveniles v. Secretary of Pub. Welfare, No. 77-1715 (U.S. filed Aug. 3, 1978).

be determined in light of the various interests involved.[90] In the juvenile institutionalization process state interests must be considered as well as the private interests of minors and their parents that have been affected by state action.[91]

States generally assert three independent interests in the institutionalization of minors and argue that the introduction of more formalized procedures into the process will substantially interfere with these interests.[92] The states' interests are insuring the proper mental health of children,[93] preserving the family unit and maintaining parental authority over children,[94] and protecting society from those persons who pose significant danger to the community.[95] These interests along with the private interests involved must be safeguarded.

Courts, such as the *Bartley* court, that have recognized the right of minors to substantial due process protections prior to being admitted to a mental institution by their parents reason principally by analogy to the protections that are afforded to adults in involuntary civil commitment proceedings.[96] The determination of whether the Constitution requires that states afford both minors and adults the identical due process protections in institutionalization proceedings requires that the following additional factors be examined: the magnitude of the minor's liberty interest in the commitment process; the constitutional significance of parental involvement in the commitment process; and the nature of the ultimate commitment decision.

A. The Magnitude of the Minor's Liberty Interest—A Function of Maturity

Constitutional attacks against juvenile commitment procedures are unusual because they involve children challenging the state's rec-

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90. Morrissey v. Brewer, 408 U.S. 471 (1972).

91. *See* Mathews v. Eldridge, 424 U.S. 319 (1976); Morrisey v. Brewer, 408 U.S. 471 (1972).

92. *See, e.g.,* Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975) (three-judge court). *Cf. In re* Gault, 387 U.S. 1 (1967) (argument rejected in context of juvenile court proceedings).

93. Protection of children's health has traditionally been recognized as a valid state interest. *See* notes 73-75 and accompanying text *supra. See generally* Bennett, *supra* note 80.

94. In Ginsberg v. New York, 390 U.S. 629 (1968), the Supreme Court recognized that states have a valid interest in protecting parental authority. The Court noted that "[t]he legislature could properly conclude that parents . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id.* at 639.

95. Protection of society is a valid exercise of the state's police power and generally arises in the context of adult confinements. *See* Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974) (three-judge court). For historical discussion of the state's interest in institutionalizing the mentally ill, see Comment, *Pennsylvania's Mental Health Procedures Act,* 15 DUQ. L. REV. 669 (1976).

96. *See* J. L. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976) (three-judge court), *prob. juris. noted,* 431 U.S. 936 (1977); Kidd v. Schmidt, 399 F. Supp. 301 (E.D. Wis. 1975) (three-judge court); *In re* Roger S., 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977).

ognition of parental authority rather than parents challenging the state's interference with such authority.[97] Thus, the minimum procedures constitutionally adequate to protect the child's liberty interest depend, to a large degree, on the magnitude of the child's interest at stake.

Although a minor has a liberty interest entitled to due process protection when the state is significantly involved in the minor's detention, the liberty interest of a minor is not coextensive with that of an adult.[98] The " 'power of the state to control the conduct of children reaches beyond the scope of its authority over adults,' "[99] and therefore, due process protections in juvenile institutionalization proceedings need not be identical with those accorded adults. Courts have difficulty defining the extent of a minor's liberty interest, but opinions tend to focus upon maturity as a valid criterion for analyzing the scope of a minor's interests.[100]

In a leading decision discussing minors' rights in terms of maturity, *Planned Parenthood v. Danforth,*[101] the Supreme Court invalidated a state statute that required an unmarried woman under eighteen to get parental consent before obtaining an abortion. The Court held that any independent interest the parent may have in terminating the minor daughter's pregnancy is entitled to no greater weight than the right of privacy of the competent minor mature enough to have become pregnant.[102] In delivering the Court's opinion, Mr. Justice Blackmun remarked,

> We emphasize that our holding that [the section of the statute] is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. The fault with [the section] is that it imposes a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without a sufficient justification for the restriction.[103]

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97. The majority of Supreme Court decisions discussing the constitutional recognition of family relationships involve parental attacks against state interference with parental authority. *See* Moore v. East Cleveland, 431 U.S. 494 (1977); Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). *But see* Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

98. Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944); Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977) (curtailment of school students' rights to freedom of expression); Bykofsky v. Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975) (curfew against minors being on the streets during certain hours upheld).

99. Ginsberg v. New York, 390 U.S. 629, 638 (1968), quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

100. *See* Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights",* 1976 B.Y. L. REV. 605, 646-49.

101. 428 U.S. 52 (1976).

102. *Id.* at 75.

103. *Id.* (Citation omitted). The state argued that the consent provision was justified by

Danforth clearly indicates that the weight to be accorded a minor's particular liberty interest is influenced to a large degree by the maturity of the minor and the maturity required to assert intelligently the particular interest. In this respect, *Danforth* follows the Supreme Court's historical trend of considering the minor's maturity as a significant factor in the determination whether states may curtail the exercise of specific individual rights.[104]

Minors at early stages in their development are not intellectually competent to appreciate the ramifications of engaging in certain behavior. At these early stages in the minor's development states must entrust important decisions affecting the minor's health and welfare to the child's parents. Consequently, as the minor's level of maturity increases, the state's corresponding authority over the minor decreases.[105]

1. Age—A Constitutional Measure of Maturity.— Although the state has a legitimate interest in protecting the welfare of children,[106] this interest must be balanced against a minor's right to be free from state interference with the exercise of his constitutional rights. Since maturity is a key factor in the constitutional balance, legislatures must adopt guidelines to measure maturity. For legislative purposes age is the most reasonable guideline.[107] In *Oregon v. Mitchell*[108] the Supreme Court upheld Congress' power to set the voting age in national elections at eighteen; although the Court acknowledged that the right to vote is among the most fundamental rights enjoyed by

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the state's interest in safeguarding the family unit and protecting parental authority. In rejecting this argument, the Court observed,

> It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure.

Id. at 75. Compare *Danforth* to Doe v. Irwin, 441 F. Supp. 1247 (W.D. Mich. 1977), in which the court enjoined several state agencies from distributing contraceptives to unemancipated minors without notifying or receiving consent from the minors' parents. The court held that, even in light of *Danforth,* state involvement in this area violated parent's constitutional rights: "[E]ven if there is a fundamental civil right among minors to obtain prescriptive contraceptives, that right need not exist to the total exclusion of any rights of the child's parents." *Id.* at 1254.

104. *See, e.g.,* Oregon v. Mitchell, 400 U.S. 112 (1970) (voting); Ginsberg v. New York, 390 U.S. 629 (1968) (access to reading materials); Prince v. Massachusetts, 321 U.S. 158 (1944).

105. *See In re* Roger S., 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977). The court held that the state must recognize the liberty interests of minors fourteen or older and provide substantial due process protection before allowing parents to institutionalize children above this age. The court, however, specifically refused to determine whether minors below fourteen have similar liberty interests that the state must protect. *See generally* Engdahl, *Constitutionality of the Voting Age Statute,* 39 GEO. WASH. L. REV. 1, 34-38 (1970).

106. *See* notes 73-75 and accompanying text *supra.*

107. *See* Oregon v. Mitchell, 400 U.S. 112 (1970).

108. *Id.*

citizens in a democracy, it held that legislatures have the responsibility to determine at what age citizens are intellectually mature enough to exercise this right.[109]

Legislatures must examine particular constitutional rights and determine at what age the minor's level of maturity is such that his right outweighs the state's interest in protecting the minor's welfare. In evaluating this legislative judgment, courts "do not demand of legislatures 'scientifically certain criteria of legislation.'"[110] Moreover, courts should not second guess legislative determinations about the age at which minors are competent to make certain decisions or engage in particular activities.[111] Rather, courts should sustain the legislative judgment provided that it is supported by substantial evidence.[112]

2. The Pennsylvania Measurement of Maturity—Fourteen Years Old.—States have traditionally entrusted parents and physicians with making medical decisions in the best interests of children.[113] The Pennsylvania Legislature has determined that minors below the age of fourteen are not competent to be entrusted with decisions concerning the appropriateness of mental health treatment.[114] Furthermore, the legislature has concluded that minors below this age will be adversely affected if subjected to adversary proceedings in the institutionalization process.[115] Substantial evidence supports the legislature's judgment that more formalized admission procedures are detrimental to the child's well-being.[116] Convincing evidence to the contrary also exists.[117] Legislatures, rather than courts, should evaluate the conflicting evidence of the differing psychological ramifica-

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109. Mr. Justice Douglas acknowledged,

> It is said, why draw the line at 18? Why not 17? Congress can draw lines and I see no reason why it cannot conclude that 18-year-olds have that degree of maturity which entitles them to the franchise. They are "generally considered by American law to be mature enough to contract, to marry, to drive an automobile, to own a gun, and to be responsible for criminal behavior as an adult."

Id. at 142 (Douglas, J., concurring and dissenting) (quoting Engdahl, *supra* note 105 at 36).

110. Ginsberg v. New York, 390 U.S. 629, 643 (1968) (quoting Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911)).

111. *See* Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977).

112. *Id.*

113. *See* notes 80-84 and accompanying text *supra.*

114. *See* PA. STAT. ANN. tit. 50, § 7201 (Purdon 1969 & Supp. 1978).

115. *See* Brief for Appellants at 35-36, Institutionalized Juveniles v. Secretary of Pub. Welfare, No. 77-1715 (U.S. filed Aug. 3, 1978).

116. *See* Smith v. Organization of Foster Families, 431 U.S. 816, 852 n.59 (1977). *See generally* J. GOLDSTEIN, A FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973); Hafen, *supra* note 100, at 651-56.

117. *See* Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30, 45 (E.D. Pa. 1978) (three-judge court). *Cf. In re* Gault, 387 U.S. 1, 26 (1966) (due process protections may be therapeutic rather than detrimental in juvenile court proceedings). *See also* Comment, *Due Process Limitations on Parental Rights to Commit Children to Mental Institutions,* 48 U. COLO. L. REV. 235, 256-57 (1977).

tions that may occur with various age levels and institutionalization procedures and devise the system that will best serve the child's interests.[118]

B. The Constitutional Significance of Parental Involvement in the Institutionalization Process

1. Parental Involvement Alters the Nature of the State's Involvement in the Institutionalization Process.—Parental involvement in the institutionalization process cannot be ignored. Under the Pennsylvania mental health scheme parents must initiate the commitment process and consent at all times thereafter to their child's continued hospitalization.[119] The parents involvement in the child's hospitalization is significant because "parents . . . have powers greater than that of the state to curtail a child's exercise of the constitutional rights he may otherwise enjoy, for a parent's own constitutionally protected 'liberty' includes the right to . . . 'direct the upbringing and education of children.' "[120]

Courts that have analyzed the constitutionality of juvenile admission statutes have determined correctly that parental involvement in the institutionalization decision does not abrogate the state's responsibility to provide due process protections to safeguard the child's liberty interests.[121] Nevertheless, many of these courts failed

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118. In Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), the court of appeals admonished the district court for engaging in such judicial legislating. The court stated,

> In determining the constitutionality of restrictions on student expression . . . it is not the function of the courts to reevaluate the wisdom of state officials charged with protecting the health and welfare of public school students. The inquiry of the district court should have been limited to determining whether defendants had demonstrated a substantial basis for their conclusion that distribution of the questionnaire would result in significant harm to some . . . students.
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> . . . Although psychological diagnoses of the type involved here are by their nature difficult of precision, . . . a federal court ought not impose its own views in such matters where there is a rational basis for the decisions and actions of the school authorities.

Id. at 519.

The state's determination that an adversary institutionalization process will deter parents from obtaining psychiatric care for their child should also be given significant weight when the admission procedures are subjected to judicial scrutiny. In devising admission procedures for young children, state legislatures must consider the potential effect on the parents because "[t]he state has an interest in seeing that a procedural system will not deter parents, already faced with this difficult decision, from attempting to institutionalize children who are in need of treatment only mental institutions can provide." Bartley v. Kremens, 402 F. Supp. 1039, 1049 (E.D. Pa. 1975) (three-judge court).

It is possible that neither the parent nor the child will benefit from the introduction of adversary proceedings into the institutionalization process. The *Bartley* court, however, substituted its own views for those of the legislature in fashioning new admission procedures. *See* 402 F. Supp. at 1058 (Broderick, J., dissenting).

119. PA. STAT. ANN. tit. 50, §§ 7201, 7206 (Purdon 1969 & Supp. 1978).

120. *In re* Roger S., 19 Cal. 3d 921, 928, 569 P.2d 1286, 1290, 141 Cal. Rptr. 298, 302 (1977) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923), and Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925)).

121. *See* notes 87-89 and accompanying text *supra.*

to consider that parental participation significantly altered the "precise nature of the government function involved"[122] in the minor's hospitalization, which affects the particular fourteenth amendment protections required.

Many courts also have mistakenly analogized juvenile institutionalization proceedings to juvenile court proceedings and then interpreted the Constitution to require almost identical protections for both. This approach shows a failure by the courts to appreciate the different nature of the relationships in the two areas.[123] In the admission of minors to mental institutions the state makes its facilities available to aid parents in obtaining medical treatment for their child.[124] Since the parents initiate the process and the state's role is merely to provide treatment to the child, the state does not stand in an adversarial relationship to the child. The relationship between the minor and the state in juvenile court proceedings, however, is necessarily much more adversarial than in institutionalization proceedings, since the state accuses the juvenile of engaging in behavior that would constitute a crime if performed by an adult. As the relationship between the state and the individual becomes more adversarial, the fourteenth amendment requires the state to provide increasing due process protections to safeguard the private interests affected by governmental action.[125] Thus, because the relationships are less adversarial in juvenile institutionalizations than juvenile court proceedings, states may satisfy the fourteenth amendment by providing less extensive procedural protections.

The state's posture in the juvenile institutionalization area is also significantly different than in juvenile court proceedings and other situations in which the state stands against both parent and child. The Supreme Court has held that minors are entitled to substantial due process safeguards prior to an adjudication of delinquency in juvenile court proceedings.[126] In *Gault* the Court was careful to point out that the due process protections are necessary there not only to protect the rights of the child, but to protect the parent's liberty interests from state invasion by removal of the child

122. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (quoting McElroy v. Cafeteria & Restaurant Union Workers, 367 U.S. 886, 895 (1961)).

123. *Compare* text accompanying note 21 *with* note 54 *supra*.

124. *See* note 83 and accompanying text *supra*.

125. *See* Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) (teacher-student relationship); Goss v. Lopez, 419 U.S. 565 (1975) (student-disciplinarian relationship); Arnett v. Kennedy, 416 U.S. 134 (1974) (employer-employee relationship); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole officer-parolee relationship); Fuentes v. Shevin, 407 U.S. 67 (1972) (debtor-creditor relationship); Bell v. Burson, 402 U.S. 535 (1971) (motor vehicle department-driver relationship); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare administrator-recipient relationship).

126. *See* note 54 *supra*.

from the family environment to face accusations of engaging in illegal activities.[127]

By admitting minors to mental hospitals on the initiation of their parents, the state is not invading the protected liberty of parents, but, on the contrary, is supporting parental rights to control the proper development of their children. The minor's liberty interest is also protected by the parent's continued participation in the institutionalization process. The parent stands between the child and the state as an added assurance that the state will detain the minor no longer than necessary to complete the medical treatment.[128] Since both the parents' and the child's interests are protected to some degree by parental involvement in the hospitalization decision, due process does not require the extensive protections that are mandated in juvenile court proceedings.

2. Parent-Child Conflict—An Unconstitutional Presumption.— The *Bartley* court predicated its finding that parental involvement in the institutionalization process is insufficient to reduce the due process protections necessary to safeguard the child's liberty interest upon the possibility of a conflict of interest between parent and child.[129] Courts have often intruded upon parental authority in decisions concerning child rearing when it has been shown that the child's welfare is in jeopardy because of some neglect or irresponsibility on the part of the parents.[130] These cases involved situations of express conflict between parent and child, which generally arise when parents refuse to consent to necessary medical care for their children.[131] The *Bartley* court went a step further and presumed parental incompetence even when parents follow medical advice by obtaining medical treatment for their children.

Since parents have the primary responsibility for raising children, the law presumes that parents act in their child's best inteiests.[132] The *Bartley* court acknowledged this presumption when it stated, "We presume that in most instances parents, proceeding in

127. The Supreme Court observed that due process "does not allow a hearing to be held in which a youth's freedom and his *parents' right to his custody* are at stake without giving *them* timely notice, in advance of the hearing, of the specific issues that *they* must meet." 387 U.S. 1, 33-34 (emphasis added).

128. *But see* Ellis, *supra* note 80, at 851-52. Ellis suggests that parents under some circumstances may resort to committing their children "in order to sanction behavior of which they disapproved." The author then points out that independent expert counseling might mitigate this problem. Pennsylvania's mental health scheme mandates continued psychiatric evaluations to reduce the risk of such erroneous institutionalization. *See* notes 31-35 and accompanying text *supra.*

129. 402 F. Supp. at 1047-48.

130. *See generally* Bennett, *supra* note 80, at 302.

131. *See* Goldstein, *supra* note 82, at 651-61.

132. *See id.* at 648-49.

utmost good faith . . . in the child's best interests, properly guide, protect, and control their children."[133] The court then properly recognized that there are isolated instances in which parents do not act in their child's best interests. The court referred to the "graphic example [of] parental child abuse"[134] as evidence of a parent-child conflict of interest. Analogizing from these isolated instances, the court created a presumption that a conflict of interest occurs between parent and child when a parent, acting upon medical recommendation, seeks to admit his child to a mental institution.[135]

Furthermore, for a valid disagreement between the parent's wishes and the child's wishes to be present, the child must be mature enough to assert an informed opinion about the proposed parental action.[136] Many of the children afforded substantial due process protections by *Bartley* are not mature enough to form any opinions about the propriety of proposed medical treatment.[137]

The Supreme Court, in its remand opinion, recognized that careful attention must be given to the differences between young and very young juveniles.[138] These differences are significant in determining whether a parent-child conflict actually exists. On remand the district court bypassed the need to determine critically whether parents are incompetent to represent their child's interests, by presuming in law what could not be inferred from fact.

The Supreme Court has warned against creating presumptions that seriously impair the exercise of parental liberty interests.[139] In *Stanley v. Illinois*[140] the Court invalidated a statute that created a

133. 402 F. Supp. at 1047.

134. *Id.*

135. Since no conflict of interest is presumed when parents seek other types of medical treatment for their children, the *Bartley* court found it necessary to distinguish psychiatric treatment from treatment of other medical conditions. The court stated that "[u]nlike other kinds of medical treatment, a substantial stigma attaches to institutionalization. This stigma coupled with the substantial danger of error in [diagnoses,] and the greater potential for long-term loss of liberty create a situation substantially different from the treatment of other medical conditions." Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30, 43 (E.D. Pa. 1978). At oral argument Mr. Justice Rehnquist observed that much of these alleged differences break down when parents make life-or-death medical decisions for their children.

136. *Cf. In re* Green, 448 Pa. 338, 292 A.2d 387 (1972) (sixteen-year-old held mature enough to be consulted regarding proposed medical treatment). *But cf.* Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941) (fifteen-year-old held not competent to consent to medical operation).

137. As observed in appellant's brief, "It strains the imagination to conceive of a ten-year old child able to decide for himself or herself the wisdom of a psychiatric admission any more than of an appendectomy or a blood transfusion:" Brief for Appellants at 32, Institutionalized Juveniles v. Secretary of Pub. Welfare, No. 77-1715 (U.S. filed Aug. 3, 1978) (quoting Eisenberg, *An Epidemic of Kew Gardens Syndrome: The Redefinition of Caring as Coercion, International Symposium of the Thistletown Regional Center* (September 1977) (to be published in New Directions of Children's Mental Health, Spectrum Publications 1978).

138. Kremens v. Bartley, 431 U.S. 119, 135 (1977).

139. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972).

140. 405 U.S. 645 (1972).

presumption that unwed fathers are unfit to care for their children upon the mother's death. Although the principal defect in the statute was its failure to require a hearing to prove the father's unfitness as a parent, the Court's general disdain for presumptions that invade parental constitutional rights is apparent:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.[141]

The Pennsylvania Legislature avoided creating a presumption that parents are not acting in their child's best interests when admitting their child for inpatient psychiatric care.[142] The legislature adequately protected against the possibility that a small percentage of parents may attempt institutionalization for improper motives by requiring independent psychiatric review of the initial commitment decision[143] and continuing psychiatric review of the child's need for

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141. *Id.* at 656-57. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Supreme Court rejected Wisconsin's argument that allowing Amish parents to withdraw their children from school at age fourteen rather than age sixteen would infringe upon the child's right to secondary education. The Court concluded,

> The State's argument proceeds without reliance on any actual conflict between the wishes of the parents and children. It appears to rest on the potential that exemption of Amish parents from the requirements of the compulsory-education law might allow some parents to act contrary to the best interests of their children by foreclosing their opportunity to make an intelligent choice between the Amish way of life and that of the outside world.
>
> Indeed it seems clear that if the State is empowered, as *parens patriae*, to "save" a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child.

Id. at 232. *Cf.* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969). In *Tinker* the Supreme Court reversed a district court decision that a school district could forbid the wearing of armbands in protest of the Vietnam War because of the school district's fear that the armbands might create a disturbance in the school environment. The Court emphasized that "in our system undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508.

142. In essence, the *Bartley* court has ordered Pennsylvania to intervene in parental decisions because of a mere potential conflict of interest between parent and child. The Supreme Court, however, has indicated that such state interference would be constitutionally suspect even though an express conflict existed between parent and child. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972), in which the Supreme Court expressed grave doubts whether the Constitution would permit states to interfere with parental rights when children expressed a desire to continue their high school attendance in opposition to their parent's wishes. The Court stated,

> Recognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here and those presented in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). On this record we neither reach nor decide those issues.

Id. at 231.

143. *See* note 31 and accompanying text *supra*.

further hospitalization.[144] Although the *Bartley* court realized that few parents institutionalize their children for improper motives,[145] the court, nevertheless, devised procedures in an attempt to protect those few minors without realizing that the procedures would do damage to all.[146]

C. *The Commitment Decision*

1. The Constitutional Standard.—The Supreme Court has specifically refused to afford minors the same constitutional rights as adults merely because of the state's presence in the challenged activity.[147] The *Bartley* court, however, examined the due process protections afforded to adults in involuntary commitment proceedings[148] and then transferred those protections to juveniles in institutionalization proceedings.[149] In doing so, the court failed to appreciate the

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144. *See* note 32 and accompanying text *supra.*

145. The court recognized that, "A decision to institutionalize a child is often a difficult yet necessary decision for a child's parent to make. It is generally pursued only after all other alternatives have proven futile." 402 F. Supp. at 1049.

146. That a number of parents do abuse their children and may wish to be rid of them at all costs does not contravene the correctness of assuming good will as the starting point. The new doctrine stands the world on its head. In the effort to prevent the violation of some, it does violence to all.

Brief for Appellants at 38, Institutionalized Juveniles v. Secretary of Pub. Welfare, No. 77-1715 (U.S. filed Aug. 3, 1978) (quoting Eisenberg, *supra* note 137).

147. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

148. 402 F. Supp. at 1045-46.

149. An adult subject to involuntary civil commitment on the ground of mental illness is entitled to substantial due process protections before the state can deprive him of his fourteenth amendment liberty interest in freedom from state confinement. *See* Bell v. Wayne County, 384 F. Supp. 1085 (E.D. Mich. 1974), *cf.* Morrissey v. Brewer, 408 U.S. 471 (1972) (revocation of parole without providing informal hearing violates fourteenth amendment due process). These protections include the right to a judicial hearing. Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974) (three-judge court). Moreover, notice of the hearing must be given "sufficiently in advance . . . so that reasonable opportunity to prepare will be afforded." *Id.* at 388 (quoting *In re* Gault, 387 U.S. 1, 33 (1967)). The right to counsel extends to all significant stages of the commitment process, Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968); Bell v. Wayne County, 384 F. Supp. 1085, 1093 (E.D. Mich. 1974); Dixon v. Attorney Gen. of Pennsylvania, 325 F. Supp. 966, 974 (M.D. Pa. 1971), but not to preliminary information-gathering stages such as psychiatric interviews because "the presence of counsel . . . might unduly interfere with the objective evaluation of the patient's mental condition." Lynch v. Baxley, 386 F. Supp. 378, 389 n.5 (M.D. Ala. 1974) (three-judge court).

Adult commitment proceedings are governed by the same rules of evidence applicable to other judicial proceedings, and the subject of the involuntary commitment has both the right to confront and cross-examine witnesses testifying in favor of commitment, as well as the right to offer evidence in his own behalf. Specht v. Patterson, 386 U.S. 605, 610 (1966); Lessard v. Schmidt, 349 F. Supp. 1078, 1103 (E.D. Wis. 1972) (three-judge court), *vacated and remanded on other grounds,* 414 U.S. 473 (1974), *reinstated,* 379 F. Supp. 1376 (E. D.Wis. 1974), *vacated and remanded on other grounds,* 421 U.S. 957 (1975). Courts differ, however, on the standard of proof required in civil commitment proceedings. *See In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973) (beyond a reasonable doubt); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974) (three-judge court) (clear, unequivocal, and convincing).

Compare the rights afforded adults in the involuntary commitment process with text accompanying note 21 *supra* (rights afforded minors by *Bartley* court).

differing constitutional standards applicable to the commitment of juveniles and adults.

In *O'Connor v. Donaldson*[150] the United States Supreme Court reviewed adult civil commitments and held that a finding of mental illness alone does not provide sufficient constitutional justification for the state's involuntary confinement of an adult.[151] The fourteenth amendment requires an additional showing that the adult is dangerous to himself or others.[152]

> A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that the term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.[153]

The adult's confinement determination, therefore, requires both a medical diagnosis of mental illness and a "social and legal judgment that [the adult's] potential for doing harm, to himself or others, is great enough to justify such a massive curtailment of liberty."[154] The judicial process in the adult commitment decision protects the determination of whether an adult's mental illness poses a significant danger to the welfare of the individual or society.[155] Discussing the need for more than medical input into the adult commitment decision, the Supreme Court observed that in "making this determination, the jury serves the critical function of introducing into the

150. 422 U.S. 563 (1975).

151. The plaintiff, Donaldson, had been committed to a state mental institution upon a state court's conclusion that he was suffering from "paranoid schizophrenia." The evidence at trial indicated that Donaldson was not dangerous at anytime during his confinement and had not received treatment for his alleged illness. The Court specifically refused to decide whether mentally ill persons, dangerous to themselves or others, have a constitutional right to treatment upon involuntary confinement by the state, or whether nondangerous, mentally ill adults may be involuntarily confined for the purpose of treatment. *Id.* at 573. The court of appeals held that "a person involuntarily civilly committed to a state mental hospital has a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition." Donaldson v. O'Connor, 493 F.2d 507, 520 (5th Cir. 1974).

152. Some jurisdictions require that the "dangerousness" element must be evidenced by a recent act. *See, e.g.,* Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974).

153. 422 U.S. at 575. The Court further held that even if the initial commitment was founded upon an adequate constitutional basis, confinement could not constitutionally continue after the basis no longer existed. *Id. Cf.* Jackson v. Indiana, 406 U.S. 715 (1972) (deaf mute, accused of robbery, was committed because of his mental incapacity to stand trial). The Court held that such commitment was constitutionally valid only if a substantial likelihood existed that he would regain sufficient capacity to stand trial within a reasonable time. Otherwise, confinement must be justified by the same standards underlying other civil commitments.

154. Humphrey v. Cady, 405 U.S. 504, 509 (1972). Although the *Donaldson* court limited its holding to custodial confinement, other courts have indicated that a nondangerous, mentally ill adult cannot be involuntarily confined even for treatment purposes. *See, e.g.,* Stamus v. Leonhardt, 414 F. Supp. 439 (S.D. Iowa 1976); Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Haw. 1976); Bell v. Wayne County, 384 F. Supp. 1085 (E.D. Mich. 1974).

155. *See* Humphrey v. Cady, 405 U.S. 504, 509 (1972).

process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment."[156]

The constitutional standard applicable to commitment of minors to state mental health facilities does not encompass the "social and legal" judgments of dangerousness underlying adult commitments. Findings of mental illness and the propriety of institutional treatment are the only determinations that must be made.[157] These decisions are medical rather than legal.[158]

Recently the California Supreme Court rejected an argument that minors must meet the adult standard of "dangerous to themselves or others" before institutionalization can be constitutionally permissible.[159] After examining an adult's and a minor's liberty interests to determine whether the fourteenth amendment required identical standards in both adult and juvenile commitments, the court concluded that nondangerous minors are not denied equal protection when institutionalized by their parents for mental health treatment.[160] The court's holding derives ample support from United States Supreme Court decisions indicating that maturity is a significant factor in assessing the magnitude of minors' constitutional rights.[161] Since the institutionalization decision is predicated on a finding that the minor is mentally ill and will benefit from inpatient psychiatric treatment, it must be determined whether the judiciary or the medical profession should be entrusted with this decision.

2. The Diagnosis—A Question of Law or Medicine?—The

156. *Id.*

157. *In re* Roger S., 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977). The *Bartley* court realized the essentially medical nature of the commitment decision when it discussed the issues to be considered at the newly mandated hearings. The tribunal is to determine first, whether the child is mentally ill; second, whether commitment is necessary and will be beneficial to the child; and third, whether commitment is the least restrictive alternative. Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30, 45 (E.D. Pa. 1978). *See also* J. L. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976) (three-judge court), *prob. juris. noted,* 431 U.S. 936 (1977).

158. *Cf.* Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) (academic achievement is an educational rather than legal determination). *See generally* Goldstein, *supra* note 82; Roth, *Some Comments on Labeling,* 3 BULL. AM. ACAD. PSYCH. L. 1 (1975).

159. *In re* Roger S., 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977) (commitment of minors fourteen or older to state mental institutions).

160. The liberty interest of an adult may sufficiently outweigh the state's interest in promoting optimal mental health that a state may not confine a nondangerous adult solely for the purpose of treating that person's mental illness. . . . It does not follow, however, that a nondangerous minor is denied equal protection if his parent is permitted to obtain treatment for the minor's mental illness or disorder by such placement for "the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."

Id. at 19 Cal. 3d 933-34, 569 P.2d 1293-94, 141 Cal. Rptr. 305-06 (quoting Tigner v. Texas, 310 U.S. 141, 147 (1940)).

161. *See, e.g.,* Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Oregon v. Mitchell, 400 U.S. 112 (1970).

Bartley court justified the introduction of additional due process protections in the juvenile institutionalization area as a necessity to guard against an erroneous diagnosis of mental illness.[162] Courts generally refuse to intervene in medical diagnoses in other areas of medicine;[163] therefore, intervention in the area of psychiatric diagnosis requires substantial justification.[164]

The argument continually advanced in support of judicial intervention in the diagnosis of mental illness is that psychiatry is an inexact science subject to greater errors in diagnosis than other areas of medicine.[165] Differences of opinion among psychiatrists about the necessity of mental health treatment, however, should not render the psychiatric profession incompetent to be entrusted with that medical determination.[166] The Supreme Court, in *Roe v. Wade,*[167] indicated that professional disagreement in other areas of medicine did not render the physician incompetent to be entrusted with the medical decisions. Similarly, in *Doe v. Bolton*[168] the Court invalidated a Georgia statute requiring a physician to have his clinical judgment confirmed by two other physicians prior to performing an abortion. The Court noted that licensing by the state is ample recognition of the physician's ability to exercise the necessary professional judgment and found no reason to depart from the historical deference

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162. Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30,43 (E.D. Pa. 1978).

163. *See In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976). *See generally* Goldstein, *supra* note 82 at 651-59.

164. *See generally* Roth *supra* note 158.

165. *See, e.g.,* Institutionalized Juveniles v. Secretary Of Pub. Welfare, 459 F. Supp. 30,43 (E.D. Pa. 1978); J. L. v. Parham, 412 F. Supp. 112, 138 (M.D. Ga. 1976), *prob. juris. noted,* 431 U.S. 936 (1977); Rosenhan, *On Being Sane in Insane Places,* 179 SCIENCE 250 (1973). *But see* Roth, *supra* note 158 at 123-31.

166. *See In re* Roger S., 19 Cal. 3d 921, 942, 569 P.2d 1286, 1299, 141 Cal. Rptr. 298, 311 (1977) (Clark, J., dissenting), wherein Mr. Justice Clark recognizes,

> When a case is heard by the superior court, Court of Appeals, this court and the United States Supreme Court, the 20 judges may be evenly divided on the applicable principles of law. But that would not demonstrate their incompetence. The judicial robe is not a magic cloak. It should be obvious—but apparently it is not—that neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments.

167. 410 U.S. 113 (1973). The Court recognized the sensitive and emotional nature of the abortion controversy and the existence of vigorous opposing views even among physicians with respect to the abortion decision. Nevertheless, the Court invalidated a Texas criminal statute that proscribed abortions except when medically necessary to save the mother's life. The Court stated,

> The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. *Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.* If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

Id. at 165-66 (emphasis added).

168. 410 U.S. 179 (1973).

paid to the medical profession.[169] In delivering the Court's opinion, Mr. Justice Blackmun stated,

> The attending physician will know when a consultation is advisable — the doubtful situation, the need for assurance when the medical decision is a delicate one, and the like. Physicians have followed this routine historically and know its usefulness and benefit for all concerned. It is still true today that "[r]eliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he [the physician] possesses the requisite qualifications."[170]

If psychiatry is more subjective than other areas of medicine, courts should be even more reluctant to intervene in psychiatric diagnoses.[171] In *Board of Curators of the University of Missouri v. Horowitz*[172] the Supreme Court held that a medical student dismissed for academic reasons is not denied fourteenth amendment due process by denial of a hearing to challenge the propriety of the dismissal. The Court recognized the severity of the deprivation of liberty involved in the dismissal, but, nevertheless, held that the "evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations"[173] weighed heavily against judicial intervention into the process. Thus, the inherently subjective nature of academic evaluation and the inappropriateness of judicial or administrative decisionmaking for making academic evaluations significantly influenced the Court's decision.[174]

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169. *Id.*

170. *Id.*, at 199-200 (quoting, Dent v. West Virginia, 129 U.S. 114, 122-23 (1889)). *But cf.* J. L. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976) (three-judge court), *prob. juris. noted*, 431 U.S. 936 (1977). In *Parham* the district court rejected the argument that the issuance of a license by the state to practice psychiatry assures that the psychiatrist is competent to make professional judgments regarding his patient's mental condition. The court noted,

> To suggest, as we do here, that psychiatrists are not infallible is not an indictment of psychiatry. It is simply to say that psychiatrists like all humans are capable of erring. Since they are capable of erring, psychiatrists like parents cannot statutorily be given the power to confine a child in a mental hospital without procedural safeguards being imposed to guard against errors in judgment and/or the arbitrariness that the best of humans exhibit from time to time.

Id. at 138.

171. *See* Brief for Appellants at 43 n.32, Institutionalized Juveniles v. Secretary of Pub. Welfare, No 77-1715 (U.S. filed Aug. 3, 1978), wherein Pennsylvania notes that "[i]f psychiatric diagnoses are neither reliable nor valid . . . then of course court room predictions and courtroom diagnoses should cease immediately." (quoting, Roth, *supra* note 158 at 128).

172. 435 U.S. 78 (1978).

173. *Id.* at 86 n.3. *See also* Epperson v. Arkansas, 393 U.S. 97 (1968) (public education is generally committed to state and local authorities, and courts should be hesitant to intervene).

174. 435 U.S. at 90. The Court was careful to distinguish academic evaluations from the disciplinary determinations that were held in *Goss* to require minimal due process in the decisionmaking process. Rejecting judicial interference in academic evaluations, the Supreme Court emphasized,

> Such a judgment is by its very nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evalua-

The Supreme Court's refusal to undermine the authority of educators in making academic determinations indicates that judicial intervention in the field of psychiatric diagnoses should also be opposed. Psychiatric determinations, like academic evaluations, require "expert evaluation of cumulative information and [are] not readily adaptable to the procedural tools of judicial or administrative decisionmaking."[175]

Of even greater consequence, the introduction of adversary procedures into relationships that are not by nature adversarial can serve only to weaken those relationships and do harm to the very children the procedures are intended to protect.[176] The present Pennsylvania procedures afford children constitutionally adequate protection against erroneous institutionalization and, at the same time, minimize the trauma of those children in need of hospitalization.

V. Conclusion

Juvenile institutionalization is a subject that is both emotional and fraught with difficult constitutional considerations. States, acting to aid parents in providing necessary medical treatment for children, must respect the constitutional rights of both parent and child. Accordingly, the institutionalization procedures must remain flexible enough to provide mentally ill children easy access to treatment, and rigid enough to prevent erroneous commitment of children not mentally ill.

Responding to constitutional deficiencies of past legislation, the Pennsylvania Legislature has achieved within its newly enacted

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tion of cumulative information and is not readily adaptable to the procedural tools of judicial or administrative decisionmaking.

Under such circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing. The educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students.

Id.

175. *Id.* Studies indicate that judicial proceedings tend to be merely ratification procedures because judges rarely disagree with expert psychiatric diagnoses. *See* Hiday, *Reformed Committment Procedures: An Empirical Study in the Courtroom,* 11 LAW SOC'Y REV. 651 (1976); Monahan, *Empirical Analyses of Civil Commitment: Critique and Context,* 11 LAW SOC'Y REV. 619 (1977). The inability of the judiciary to render medical determinations opposes such intervention in the field of psychiatric diagnoses. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

[T]he specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and *the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.*

Id. at 335 (emphasis added).

176. *See* Smith v. Organization of Foster Families, 431 U.S. 816 (1977).

mental health scheme an adequate balance between the interests involved in juvenile institutionalization. The procedures protect a parent's liberty interests by allowing continuous parental input in the hospitalization decision and, simultaneously, protect a child's liberty interests by requiring constant psychiatric review of the child's mental condition. The judicial extension of adult due process protection into juvenile institutionalization procedures disrupts the delicate balance of the interests involved, and does so without sufficient constitutional justification.

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